United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Health

Hearing on The Protect Life Act
February 9, 2011

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SUMMARY

-Conscience protection is not a zero-sum game between conscience-driven health care providers and the patients they serve, particularly the most vulnerable women. The nation can and should both respect conscience-driven health care providers, and deliver to the most vulnerable Americans the health care their human dignity requires.

--First, there is no shortage of abortion providers in the United States, especially in the poorest communities, and among women of color.

-- Second, our nation's most vulnerable women—the poor, and women with less privileged educations -- are more likely to oppose abortion than are men, and than their more privileged sisters.

--Third, opponents of conscience protections are only attempting to force the government and conscience-driven private providers to give them what the market has steadfastly refused to do. If opponents of conscience believe this to be too few abortions, current law leaves them free to provide more abortion services.

--Fourth, there is a growing consensus among jurists, scientists and advocates on both sides of the abortion debate that abortion is killing. As such, it does not merit the title of "health care" or "standard of care."

--Fifth, there is evidence from a growing body of sociological, as well as law and economics literature, that more easily available abortion is associated with women's "immiseration," and not their flourishing.

-Proponents of conscience protection are among the most exemplary providers of care in our current health care marketplace.

-The Protect Life Act brings the Affordable Care Act into line with standards of conscience protection in health care long agreed upon at the federal level, and provides mechanisms for enforcement which are otherwise currently endangered.

-Freedom of religious and moral conscience is a universally recognized right and an intrinsic aspect of the history of the United States. This has been acknowledged by the majoirty since the beginning of legalized abortion in our nation. Opponents of conscience protection where abortion is concerned, occupy a very marginal position on this matter.

Good afternoon, and thank you for the opportunity to testify. I am a professor of family law and law and religion at the George Mason University School of Law and a Senior Fellow at the Witherspoon Institute. My testimony today addresses the importance of shielding from discrimination those health care providers and entities conscientiously objecting to abortion, under the Patient Protection and Affordable Care Act (hereafter "Affordable Care Act"). While I am not specifically addressing the question of federal funding of abortion, several of my arguments support the wisdom of those parts of the Protect Life Act which ensure that federal funds do not support abortion

As an initial matter, I want to suggest to the Committee that there is no need for us to view the matter of conscience protection as a zero-sum game between conscience-driven health care providers and the patients they serve, particularly the most vulnerable women. There is no question that as a nation, we can and should do both – respect conscience-driven health care providers, and deliver to the most vulnerable Americans the health care their human dignity requires. Protecting moral and religious conscience allows us to strike this balance; this can be understood from several angles.

First, clearly even if one believes that abortion is an integral part of women's health care -- which I do not – it is hard to claim a shortage of abortion providers when there occur over 1.2 million abortions annually in the United States, with a disproportionate number concentrated in our poorest communities, and among women of color.[1]

Second, our nation's most vulnerable women—the poor, and women with less privileged educations -- are more likely to oppose abortion than are men, and than their

[1] *See, e.g.* Characteristics of U.S. Abortion Patients, 2008, Guttmacher Institute (May 2010).

more privileged sisters. [2] They are also less likely to abort their nonmarital pregnancies than the latter group.[3]

Third, it appears that what opponents of conscience protections -- which they call "refusal clauses"[4] -- actually intend, is to force the government and conscience-driven private providers to give them what the market has steadfastly refused: widely dispersed sources for abortions provided in hygienic medical settings. What they have instead – even after 38 years of legal abortion in the United States -- is a market that looks like this: 87% of U.S. counties with no abortion provider[5]; steadily declining numbers of abortion clinics (which decline began long before clinic prayer vigils and protests began in earnest), largely due to the stigma associated with abortion among physicians and in the medical profession generally[6]; delivery of abortions, in the words of the *New York Times*, at the "margins of medical practice,"[7] *i.e.* abortions being performed in the vast majority of cases in free standing clinics (many run by one vocal interest group, Planned Parenthood) with relatively few (about 5%) abortions provided in hospitals or doctors

[2] *See, e.g.* David M. Adamson, *et al*., How Americans View World Population Issues: A Survey of Public Opinion (Rand Corporation, 2000), 55-56 (Table 5.7: Attitudes on Conditions Under Which Abortion Should be Available by Socioeconomic and Demographic Characteristics).

[3] *See* Kathryn Edin & Maria Kefalas, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage 45 (2009).

[4] Adam Sonfield, New Refusal Clauses Shatter Balance Between Provider 'Conscience," Patient Needs, 7 The Guttmacher Report on Public Policy (Aug. 2004).

[5] Guttmacher Institute, Trends in Abortion in the United Stated, 1973-2008 at http://www.guttmacher.org/presentations/trends.pdf .

[6] *See* Lori Freedman, *et al*., Obstacles to the Integration of Abortion Into Obstetrics and Gynecology Practice, 42 Perspectives on Sexual and Reproductive Health 146 (September 2010) ("The majority were unable to provide abortions because of formal and informal policies imposed by their private group practices, employers and hospitals, as well as the strain that doing so might put on relationships with superiors and coworkers…. Several physicians mentioned the threat of violence as an obstacle…but few considered this the greatest deterrent). Guttmacher Institute, Trends in Abortion in the United Stated, 1973-2008, at http://www.guttmacher.org/presentations/trends.pdf;Project Daniel, Numbering the Days of 'Legal" Abortion, at http://www.operationrescue.org/archives/project-daniel-525-numbering-the-days-of-legal-abortion.

[7] Emily Bazelon, The New Abortion Providers, *New York Times Magazine*, July 14, 2010.

offices[8]; and a steady stream of reports of abortion providers violating the most basic standards of health care for vulnerable women,[9] or violating even women's human rights. Credible reports emerged just last week about employees of several Planned Parenthood clinics offering to cooperate with a man posing as the leader of a sex trafficking ring of minor girls.[10]

Still, extant abortion providers manage to perform over 1.2 million abortions annually, disproportionately among poor women and women of color. If opponents of conscience protection believe this to be too few abortions, current law leaves them free to provide more abortion services themselves, rather than force conscience-driven providers to do so by means of federal fiat. Although recent events indicate that even the nation's largest abortion provider is having difficulty convincing its own members to expand the supply of abortion. Just this past month, a Planned Parenthood affiliate resigned from the national organization after the latter insisted that each affiliate perform abortions. The head of the Texas affiliate reported to the Corpus Christi newspaper that "there are far greater needs in our area than abortion…We don't need to duplicate services." [11]

Fourth, when insisting that women's "health care" needs merit specialized attention – a claim I also affirm -- opponents of conscience protection ought to be willing to engage in a thoughtful conversation about the meaning of health care. In the case of abortion, we find ourselves today in the midst of an emerging scientific and cultural

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[8] National Abortion Federation, Abortion Facts: Access to Abortion, at http://www.prochoice.org/about_abortion/facts/access_abortion.html.

[9] *See* Karen Heller, Politics Clouded Safeguards against Practices Like Gosnell's, Philadelphia Inquirer, Jan. 26, 2011 (Gosnell was charged with killing 7 born alive children and one woman, a political refugee from Bhutan).

[10] *See* Caught on Tape: Planned Parenthood Aids Pimp's Underage Sex Ring, Feb. 1, 2011, at http://liveaction.org.

[11] Steven Ertelt, Planned Parenthood Chapter Quits, Forced by National to Do Abortions, Dec. 21, 2010, at http://www.lifenews.com/2010/12/21/state-5757.

awareness that abortion is not health care. A majority of our U.S. Supreme Court calls abortion "killing."[12] Many abortion providers and advocates of legal abortion do the same.[13] More broadly, there is emerging evidence from a growing body of sociological, as well as law and economics literature, that more easily available abortion is associated with women's "immiseration," and not their flourishing.[14] When Justice Sandra O'Connor wrote in the *Planned Parenthood v. Casey* opinion that women had "organized intimate relationships, and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail,"[15] she was even more right than she likely knew. According to leading scholars, it certainly appears that more easily available abortion has led to

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[12] *Gonzales v. Carhart*, 550 U.S. 124, 129, 136 (2007).

[13] Sarah Terzo, ProLifeblogs.com, http://www.prolifeblogs.com/articles/archives/2009/12/is_abortion_kil.php, Dec. 4, 2009; See also the following statements: :"I agree that the way in which the arguments for legal abortion have been made include this inability to publicly deal with the fact that abortion takes a life." Frances Kissling, President and CEO, Catholics for a Free Choice ("Speaking Frankly," *Ms.*, May/June 1997, page 67); "Sometimes a woman has to decide to kill her baby. That is what abortion is."Judith Arcana, Pro-Choice Author and Educator (Rosalind Cummings, "In Print: rights of the accused," *Chicago Weekly Reader*, Friday, February 17, 1995);I have angry feelings at myself for feeling good about grasping the calvaria (head), for feeling good about doing a technically good procedure which destroys a fetus, kills a baby." A New Mexico Abortionist (Diane M. Gianelli, "Abortion Providers Share Inner Conflicts," *American Medical News*, July 12, 1993, page 36); "[T]he pro-life slogan, 'Abortion stops a beating heart,' is incontrovertibly true." Naomi Wolf, Pro-Choice Author (Naomi Wolf, "Our Bodies, Our Souls," *TheNew Republic*, October 16, 1995, page 29); "One of the facts of abortion, he [Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers] said, is that women enter abortion clinics to kill their fetuses. 'It is a form of killing,' he said. 'You're ending a life.'"An Abortion Rights Advocate Says He Lied About Procedure," by David Stout,*New York Times*, February 26, 1997, page A11; "Abortion kills the life of a baby after it has begun." Planned Parenthood ("Plan Your Children for Health and Happiness," pamphlet, 1963).

[14] *See e.g*. Jonathan Klick, Thomas Stratmann, Abortion Access and Risky Sex Among Teens: Parental Involvement Laws and Sexually Transmitted Diseases (2006) at http://www.yeson4.net/pdfParentalInvolvementActANDSTDReduction.pdf; Michael New Analyzing the Effect of State Legislation on the Incidence of Abortion Among Minors (Heritage Foundation, Center for Analysis Data Report #7-01); Timothy Reichert, Bitter Pill, First Things (May 2010), Tim Harford, The Logic of Life: The Rational Economics of an Irrational World (2009); George A. Akerlof, Janet L. Yellen and Michael L. Katz, An Analysis of Out-of-Wedlock Childbearing in the United States, 111 The Quarterly Journal of Economics 277 (1996); Roy F. Baumeister, Kathleen D. Vohs, Sexual Economics: Sex as Female Resource for Social Exchange in Heterosexual Interactions, 8 Personality and Social Psychology Review 339 (2004).

[15] *Planned Parenthood v. Casey*, 505 U.S. 833, 835 (1992).

expectations of more uncommitted sexual encounters – a situation which itself contradicts women's demonstrated preferences – and thereby to more sexually transmitted infections, more nonmarital pregnancies and births, and more abortions.[16] Women of color, poor women and recent immigrants, are suffering these consequences in disproportionate numbers.

If opponents of conscience protection want to encourage high quality, readily available health care for women, especially vulnerable women, they could not do better than to ally themselves with supporters of conscience protections. In the United States, this group is regularly comprised of the kinds of providers and institutions ready to assist the most vulnerable women, even with free or low cost care. These include, for example, Catholic hospitals which in 2009 alone, provided care for nearly 86 million patients at 561 hospitals.[17] These also include networks of individual doctors willing to provide free or low cost health care to women.[18] These providers have demonstrated their sense of vocation, and a sensitivity to the needs of the most vulnerable. If not for these institutions and providers, a great deal more of the work of caring for the sick, the poor and the marginalized would fall to the government, or simply go undone. They are proof that protection of conscience and care for the vulnerable are not opposite values, but overlapping ones, or even one and the same. These are not the providers that the law should be driving out of the health care marketplace.

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[16] *See* Roy F. Baumeister, Kathleen D. Vohs, Sexual Economics: Sex as Female Resource for Social Exchange in Heterosexual Interactions, 8 Personality and Social Psychology Review 339 (2004). *See also*, note 14, *supra*, and all sources cited therein.

[17] U.S. Conference of Catholic Bishops, The Catholic Church in the United States at a Glance, at http://www.usccb.org/comm/catholic-church-statistics.shtml.

[18] *See, e.g.* Pregnancy Resource Center, A Passion to Serve, A Vision for Life, at http://www.apassiontoserve.org.

The Protect Life Act will help to assure that conscience-driven health care providers remain in this marketplace, able to continue to provide their vital services to all Americans, and particularly the most vulnerable. While the Affordable Care Act allowed such providers some protection, it did not go far enough. The final Senate bill, later passed by the House of Representatives, lacked some basic and important conscience protections. For example, while §1303 (b)(4) of the Affordable Care Act prohibits health are plans that qualify to participate in state health insurance exchanges from discriminating against any health care provider or facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions, it does not encompass refusals to train for abortion, nor does it protect providers or health care entities against discrimination by various government entities or institutions receiving federal funds. Also, the protection from discrimination by governmental actions, in §1553 of the Affordable Care Act is limited to procedures designated as assisted suicide, mercy killing and euthanasia. The Protect Life Act, on the other hand, adds that neither federal agencies nor programs, nor any state or local government receiving federal financial assistance, may discriminate against any institutional or individual health care entity or require any health plan created or regulated under the Affordable Care Act to discriminate against any institutional or individual health care entity on the basis of a refusal to train require or provide training for, perform, participate, provide coverage of or pay for or refer for abortions.

The Affordable Care Act also neglected explicitly to protect existing state conscience protections against preemption, even while it did protect against federal preemption of state abortion laws regulating abortion or abortion coverage. The Protect

Life Act explicitly provides that federal law does not preempt state conscience protection laws. This is crucial, given that these have been enacted today in 47 states and the District of Columbia.[19]

The Affordable Care Act also lacked sufficient enforcement mechanisms in connection with its limited conscience protections. Given the hurdles to claiming a private right of action in connection with federal conscience laws (*see, e.g. Cenzon-Decarlo v Mt. Sinai Hospital*, 626 F.3d 695 (2nd Cir., 2010)), and the current lack of detailed enforcement mechanisms associated with extant federal conscience protection laws (given the Obama administration's February 2009 proposal to rescind relevant regulations on this subject), it is important the that this comprehensive new health care law specify enforcement mechanisms. The Protect Life Act does this, by explicitly giving U.S. courts jurisdiction to prevent or redress violations. Furthermore it gives not only the Attorney General of the United States, but also "health care entit[ies]" the ability to commence an action. It also designates the Office for Civil Rights of the Department of Health and Human Services to receive and pursue investigation of such complaints.

In conclusion, the freedom of religious and moral conscience is enshrined in the United Nations' Universal Declaration of Human Rights.[20] Our current President, Barack Obama, has written that "[s]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square," and about how some of the greatest reform movements in U.S. history were spearheaded by religious and moral

[19] NARAL Pro-Choice America, Refusal Clauses, at http://www.naral.org/what-is-choice/abortion/abortion-refusal-clauses.html.
[20] Universal Declaration of Human Rights, Preamble, Article 1.

leaders.[21] We should be agreed as a nation on the proposition that human beings require respect for their religious and moral consciences as a condition for living in freedom and personal integrity. There should also likely be little disagreement about the role played by freedom of conscience in the very founding of our nation. From the beginning, too, Americans understood the positive role that people of faith and moral conviction played in the health and stability of their communities. George Washington in his *Farewell Address* (1796) opined that "Of all the dispositions and habits which lead to political prosperity, religions and morality are indispensable supports… A colume (sic) could not trace all their connections with private and public felicity." Early jurists concluded similarly. One Massachusetts Supreme Court opinion stated: "The object of a free government is the promotion and security of the happiness of the citizens. These effects cannot be produced, but by the knowledge and practice of our moral duties….Human law cannot oblige to the performance of the duties of imperfect obligation: as the duties of charity and hospitality, benevolence and good neighborhood…these are moral duties, flowing from the disposition of the heart, and not subject to the control of human legislation."[22]

Abortion supporters' insistence to the contrary -- that health care providers check their consciences at the door[23] --should be recognized for the marginal and dangerous opinions they are.

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[21] Barack Obama, Call to Renewal Keynote, Address, June 28, 2006, at http://barackobama.com/2006/06/28/call_to_renewal_keynote_address.php.

[22] *Barnes v. First Parish in Falmouth*, 6 Mass. 400 (1810).

[23] *See e.g.*, National Health Law Program, Health Care Refusals: Undermining Quality Care for Women (2010), pp. 21-22 ("[R]esearchers found that 63 percent of physicians thought it ethically permissible to tell patients about their personal objections to a particular health care service. Given the imbalance of power between physicians and patients, such disclosures violate the requirement to present medical facts that are unbiased and evidence based.")

Insofar as abortion is concerned, for as long as it has been legal, state and federal lawmakers have understood the need to provide accompanying conscience protection. Before *Roe. v. Wade*, in states with limited abortion licenses, conscience protections existed.[24] In *Roe's* companion case, *Doe v. Bolton*, the U.S. Supreme Court called Georgia's broad conscience protections for hospitals and providers "appropriate"; these included protections allowing hospitals for example, to refuse to provide abortions, or to set up ethics committees to evaluate requests for abortion, and allowing individual providers to refuse to cooperate with abortions. [25] Immediately post-*Roe*, the Church Amendment was enacted at the federal level to forbid health care entities receiving certain federal grants or contracts to discriminate in training and employment against health professionals or applicants for study because they are willing *or* unwilling to participate in abortion or sterilization. [26]

In sum, the Protect Life Act is a both a necessary and a wise amendment to the Affordable Care Act on so many grounds. It helps preserve within our nation's health care delivery system the valuable contributions made by conscience driven providers and institutions to the needs of the most vulnerable women and men. It indicates that abortion has not attained the status of a "standard" of health care, a message which might well help begin to reverse the negative role played by legalized abortion in the lives of American women, particularly the most vulnerable women. And it preserves in American law and culture the bedrock value of respect for religious and moral conscience.

Thank you again for this opportunity.

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[24] See Mark Rienzi, The Fourteenth Amendment Right of Conscience: *Roe*, *Casey* and the Right to Refuse, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662934. (working paper series).
[25] *Doe v. Bolton*, 410 U.S. 179, 197-98.
[26] 42 USC §300a-7.